

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
FRANCIS GREENBURGER AND	:	DETERMINATION
RS & P/WVII LIMITED PARTNERSHIP	:	DTA NO. 810773
	:	
for Revision of a Determination or for Refund	:	
of Real Estate Transfer Tax under Article 31	:	
of the Tax Law for the Year 1986.	:	

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Petitioners, Francis Greenburger and RS & P/WVII Limited Partnership, c/o Time Equities, Inc., 55 Fifth Avenue, New York, New York 10003, filed a petition for revision of a determination or for refund of real estate transfer tax under Article 31 of the Tax Law for the year 1986.

Petitioners, by their duly appointed attorney and representative, Ziegler, Sagal & Winters, P.C. (Stephen S. Ziegler, Esq., of counsel), and the Division of Taxation by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel), submitted a Stipulation of Facts<sup>1</sup> which by its terms waives the right to a hearing. Pursuant to the stipulation, the parties agreed to submit for determination the threshold issue of whether petitioners' claim for refund was timely filed. Under the stipulation, if it is determined that said refund claim was not timely filed, petitioners' petition shall be denied. If it is determined that petitioners' refund claim was timely filed, then the parties agree that there shall be a hearing before the Division of Tax Appeals to determine whether petitioners are

entitled to a refund. In the event of such a hearing, the parties have agreed that the stipulation would be of no further force or effect.

Briefs were submitted by both parties, the last being filed on September 15, 1993. After

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<sup>1</sup>With attached exhibits.

due consideration of all the papers, evidence and briefs filed herein, Carroll R. Jenkins, Administrative Law Judge, renders the following determination.

### ISSUE

Whether petitioners timely filed claims for refund under Article 31 of the Tax Law.

### FINDINGS OF FACT

Petitioners, Francis Greenburger and RS & P/WVII Limited Partnership, are the transferees and successors-in-interest to 299 W. 12th Corp., 302 W. 12th Corp., 59 W. 12th Inc. and 45 Christopher Corp. (the "Realty Corporations").

In December 1986 the Realty Corporations paid New York State real estate transfer tax (the "Transfer Tax") in regard to certain transfers of real property.

The transfer tax referred to above totaled \$57,605.00 and was paid by four checks tendered to the New York City Registrar upon filing of the deeds evidencing said transfers. On each of these checks was a handwritten notation "Paid under Protest." The reverse side of each of these checks is endorsed as payable to the "City of New York, Office of City Register-New York County, Treasury Collection Account."

In a letter dated May 22, 1989, Alan Winters, Esq., then attorney for petitioners, wrote a letter to the Division of Taxation ("Division") setting forth a detailed statement of the factual and substantive bases for petitioners' claim that they were entitled to a refund in the amount of \$57,605.00, plus interest. Petitioners do not argue that this letter could, by itself, constitute a timely filed application for refund.

In a letter dated June 2, 1989, the Division denied petitioners' refund claim on the basis that the claim had not been timely filed.

In a letter dated August 1, 1989, petitioners submitted a letter to the Division again stating the bases for their position that payment of the tax with checks which indicated thereon that payment was being made under protest, constituted a timely refund claim. The Division again denied petitioner's refund claim in a letter dated April 17, 1990.

### SUMMARY OF THE PARTIES' POSITIONS

Petitioners urge that marking the subject checks with the notation "Paid under Protest" constituted a valid informal claim for refund. Even if it were found that the submission of the checks with that notation did not contain all of the elements of a valid refund claim, it is petitioners' position that their May 22, 1989 letter "perfected" the initial informal refund claim appearing on the checks.

The Division urges that writing the notation "Paid under Protest" on the face of checks used to pay transfer tax, where said checks were made payable to, and endorsed by, the New York City Registrar and never came into the possession of the Division, does not constitute a valid informal claim for refund and did not place the Division on notice that petitioners would be seeking a refund or of the basis for their claim.

#### CONCLUSIONS OF LAW

A. Tax Law § 1409, in effect prior to July 1, 1989, provided:

"Whenever the tax commission shall determine that any monies received under the provisions of this article where [sic] paid in error, it may cause such monies to be refunded, without interest, pursuant to such rules and regulations as it may prescribe, out of funds in the custody of the comptroller to the credit of such taxes provided an application for such refund is filed with the tax commission within two years from the date the erroneous payment was made." (Emphasis added.)

Section 1409 was repealed in 1989 and replaced by a new section 1412, effective July 1, 1989, which provides:

"A grantor or grantee claiming to have erroneously paid the tax imposed by this article or some other person designated by such grantor or grantee may file an application for refund within two years from the date of payment. Such application shall be filed with the commissioner of taxation and finance on a form which he shall prescribe." (Emphasis added.)

Both of the above statutory provisions have in common that an application for refund under Tax Law Article 31 must be filed with the State Tax Commission (section 1409) or the Commissioner of Taxation and Finance (section 1412). The Commission's regulations (20 NYCRR former 575.11) promulgated to implement Tax Law § 1409 provided, in pertinent part:

"[A]ll claims for refund shall be filed with the Department of Taxation and Finance, Central Miscellaneous Tax Section, Mortgage and Real Estate Transfer Tax Section, Building 9, W.A. Harriman Campus, Albany, NY 12227."

Petitioners' purported informal application for refund (i.e., the notation "Paid under Protest")

was made in December 1986. The letter which petitioners argue "perfected" this informal application was sent on May 22, 1989. Therefore, only Tax Law § 1409 and related regulations (20 NYCRR former 575.11), in effect prior to July 1, 1989, are applicable to petitioners' purported refund application in this case.

B. As noted earlier, the issue in this case is whether the three words ("Paid under Protest") handwritten on each of four checks used to pay real property transfer tax to the New York City Registrar in 1986 qualifies as an informal refund claim. Petitioners can prevail only if the notation on these checks is deemed to be a valid, informal refund claim, thus tolling the two-year period of limitations, because the only other purported refund claim (the letter dated May 22, 1989) was not filed within that statutory two-year period.

C. In Matter of Rand (Tax Appeals Tribunal, May 10, 1990) the Tax Appeals Tribunal followed Federal precedent in deciding whether an informal refund claim was valid:

"In determining the validity of informal refund claims, it is appropriate to look to federal cases for guidance as Tax Law section 687 [relating to refunds of personal income tax] is similar to section 6511 of the Internal Revenue Code and was intended to conform to federal law . . . ." (Id.)

Unlike Rand, this case involves the real property transfer tax under Article 31 of the Tax Law, the provisions of which are not patterned after Federal law. However, there being a dearth of State precedent available discussing this issue, I believe that the Tax Appeals Tribunal would use the same reasoning as in Rand in analyzing the validity of an informal request for refund under Article 31. That being the case, I will do likewise.

D. The Federal courts have frequently ruled that a timely claim for refund can be made in an informal manner. A valid informal claim must have a written component that adequately apprises the taxing authority that a refund is requested and of the tax year in question. It must contain enough information to enable the taxing authority to begin an investigation of the matter, if it so chooses (Wall Industries v. U.S., 10 Cl Ct 82, 86-1 US Tax Cas ¶ 9438; American Radiator and Standard Sanitary Corp. v. U.S., 318 F2d 915, 63-2 US Tax Cas ¶ 9525 [1963]).

"[A] notice fairly advising the Commissioner of the nature of the taxpayer's

claim . . . will . . . be treated as a claim, where formal defects and lack of specificity have been remedied by amendment filed after the lapse of the statutory period." (United States v. Kales, 314 US 186, 41-2 US Tax Cas ¶ 9785 [1941].)

E. In Matter of Rand (supra) the Tax Appeals Tribunal, reversed the determination below and held that Rand had filed a valid informal request for refund. The facts in this case, however, are distinguishable from Rand.

In that case, Rand, guardian of Hope Sayles, attached a rider to each State income tax return he filed. The riders were essentially the same for each tax year, and declared, inter alia: (i) that Hope Sayles had never been "domiciled or resident" in New York State; (ii) that New York tax returns were being filed solely to avoid penalties; (iii) that the petitioner reserved the right to contend that Hope Sayles was never domiciled in or a resident of New York; and (iv) that Ms. Sayles and the petitioner, as her guardian, had never been subject to the taxing jurisdiction of New York State.

In Rand the Tax Appeals Tribunal noted that the Division's administrative actions were relevant in determining whether the riders to various tax returns constituted a valid informal refund claim. In Rand the Division had taken administrative notice of identical riders attached to Rand's tax returns in earlier years and treated them as refund requests as evidenced by an inquiry made by a Division employee requesting additional information from the taxpayer for those years. That administrative action taken by the Division's employee reflected that the Division had notice of the refund claim. There is no similar administrative action in the instant matter to suggest that the Division was aware that petitioners would be making a claim for refund.

In addition, in Rand, the riders attached to the tax returns were of sufficient detail to apprise the Division not only of the refund claim, but the nature of the argument that the taxpayers would make in support of that claim. This detail was sufficient to permit the Division to undertake an investigation of Rand's claim (Wall Industries v. U.S., supra; American Radiator and Standard Sanitary Corp. v. U.S., supra), and the Tax Appeals Tribunal held that these riders constituted a valid informal claim for refund.

By contrast, in the instant matter there are only three words, "Paid under Protest", written on each of four checks which were then delivered to the New York City Registrar to pay petitioners' real property transfer tax. Further, the Division never had possession of these checks, and could not have known that petitioners were paying under protest or intended that their checks be considered a refund claim. Even if the Division were somehow to become aware of the notation on these checks, it would still not be apprised of the substance and legal basis for petitioners' refund claim.

F. Petitioners argue that the Division is charged with the knowledge of petitioners' refund claim because the the New York City Registrar, the payee of the transfer tax, was acting as agent for the Division under Tax Law § 1407. Tax Law § 1407, in effect in 1986, provided, in pertinent part:

"The tax commission is authorized to designate such banks, trust companies . . . title insurance corporations and recording officers as it shall deem necessary to act as its agent for purposes of collecting the tax imposed by this article . . . ."  
(Emphasis added.)

This section goes on to authorize the Commission to set the terms, conditions and limitations under which such agents could act. Petitioners argue that the filing of an informal refund claim with the New York City Registrar, as agent for the Commission, was the same as filing it with the State Tax Commission in Albany. Petitioners' argument is not persuasive.

First, petitioners argued, but never offered any evidence to establish, that the Commission, as of December 1986, had never exercised its authority to designate the New York City Registrar as its agent. Even if the Commission had exercised its authority to designate the New York City Registrar as its agent, however, that designation under the terms of the statute is limited to designating an agent for the collection of the transfer tax. Under the terms of Tax Law § 1407, the New York City Registrar could not, and did not, act as the Commission's agent for purposes of receiving and accepting petitioners' refund claim.

Even if petitioners were correct that the New York City Registrar was acting as agent for the Division, however, the words "Paid under Protest" written on the face of petitioners' checks were not sufficient to apprise the Division that petitioners were seeking a refund or of the

substance and legal basis for petitioners' claim. The purpose of the claim for refund is to notify the Division of the taxpayer's position so that the Division, if it so chooses, can investigate and determine the merits of the taxpayer's claim at a point in time reasonably close to the tax year for which the claim is made (see, Furst v. U.S., 678 F2d 147, 82-1 US Tax Cas ¶ 9333; American Radiator and Standard Sanitary Corp., supra, 63-2 US Tax Cas ¶ 9525, at 89,179; Newton v. U.S., 163 F Supp 614, 58-2 US Tax Cas ¶ 9697). The words "Paid under Protest" fall far short of the mark of providing notice of petitioners' refund claim to the Division, even if payment had been made directly to the Division's offices in Albany.

G. No special forms were required of petitioners to file a request for refund of transfer tax in 1986. The letter dated May 22, 1989, if sent to the Division's Miscellaneous Tax Unit in Albany pursuant to 20 NYCRR 575.11, would have been sufficient to place the Division on notice of petitioners' claim. However, no such letter was written until May 22, 1989, so this letter, by itself, was untimely and could not constitute a valid refund claim. Even if petitioners were confused or uncertain as to where or how to file a refund claim, a dubious scenario at best, the record does not show any efforts by them to inquire of the Division as to how to proceed. Instead, petitioners did nothing until mid-1989. Petitioners have offered no explanation as to why, if they intended the notation on their checks to constitute an informal refund claim, they waited almost 2½ years (until May 22, 1989), to (using petitioners' term) "perfect it" by finally writing a letter to the Division setting forth the basis of their claim.

H. An informal claim may meet the jurisdictional requirements of a timely claim for refund (Matter of Rand, supra). However, the three words "Paid under Protest" written on the four checks used to pay the transfer tax in this case did not meet those jurisdictional requirements, because they do not satisfy the requirements of the cases cited above, do not apprise the Division of petitioners' intent to seek a refund or of the substance of their claim, do not apprise the Division of sufficient facts to permit it to undertake an investigation of petitioners' claim, if it so chose, and were not filed at the location prescribed by Tax Law § 1409 and 20 NYCRR 575.11.

I. The petition of Francis Greenburger and RS & P/WVII Limited Partnership is denied.

DATED: Troy, New York  
November 18, 1993

/s/ Carroll R. Jenkins  
ADMINISTRATIVE LAW JUDGE